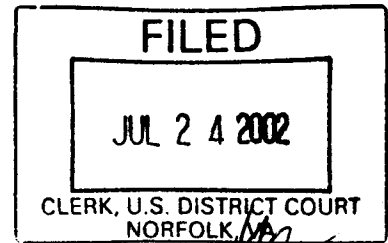


IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
NORFOLK DIVISION



YASER ESAM HAMDI,  
ESAM FOUAD HAMDI, As Next  
Friend of Yaser Esam Hamdi,

Petitioners,

v.

CASE NO. 2:02CV439

DONALD RUMSFELD  
Secretary of Defense

COMMANDER W.R. PAULETTE,  
Norfolk Naval Brig

Respondents.

**PETITIONER'S RESPONSE TO RESPONDENTS' MOTION TO TERMINATE  
APPOINTMENT OF COUNSEL**

Respondents' Motion is based upon the mistaken premise that Yaser Esam Hamdi's father is "seeking relief" in this case. This argument has no support in statute or case law related to "next friend" standing, a procedural device designed to allow individuals who are otherwise incapacitated to present claims in court. Respondents' argument also makes little sense—Yaser Esam Hamdi has been imprisoned; his father has not. Yaser Esam Hamdi therefore is the real party in interest in this case, and the only "party" seeking relief from this Court.

Consequently, this Court appropriately appointed counsel to represent Yaser Esam Hamdi. Just as it is the legality of Yaser Esam Hamdi's imprisonment that is at issue in this case, it is Yaser Esam Hamdi's finances that are relevant to the appointment of counsel. And Respondents have adduced no evidence to suggest that this Court erred in its decision to appoint counsel. For these

reasons, the Court should deny Respondents' Motion to Terminate Counsel.

### **I. The Court Possesses Jurisdiction To Address Respondents' Motion**

Respondents maintain that this Court lacks jurisdiction pending the issuance of the mandate from the court of appeals related to the interlocutory appeal of this Court's June 11, 2002, Order. While it is unusual for a movant to suggest that the Court lacks jurisdiction to address the movant's motion, this Court indeed possesses jurisdiction to address Respondents' Motion to Terminate Counsel.

"For most purposes, the entry of judgment, rather than the issuance of the mandate, marks the effective end to a controversy on appeal." *Finberg v. Sullivan*, 658 F.2d 93, 97 n.5 (3d Cir. 1980) (en banc); accord *Bryant v. Ford Motor Co.*, 886 F.2d 1526, 1529 (9th Cir. 1989). Indeed, the issuance of a mandate is a largely "ministerial function" that is immaterial to the merits of the case. See *In re Chambers Dev. Co.*, 148 F.3d 214, 224 n.8 (3d Cir. 1998) (issuance of the mandate is "largely a ministerial function" that is "wholly separate from . . . the merits.").

Moreover, the rule that a district court lacks jurisdiction over the aspects of a case involved in an appeal pending the issuance of the mandate is simply a "judge made rule originally devised in the context of civil appeals to avoid confusion or waste of time resulting from having the same issues before two courts at the same time." *United States v. Montgomery*, 262 F.3d 233, 239-40 (4th Cir. 2001). In fact, an exception to the mandate rule permits district courts to proceed in certain circumstances even when the court of appeals has yet to issue its mandate. See *id.* at 240. In particular, a notice of appeal from a non-appealable order does not divest a district court of jurisdiction. *United States v. DeFries*, 129 F.3d 1293, 1303 (D.C. Cir. 1997); *United States v. Green*, 882 F.2d 999, 1001 (5th Cir. 1989).

This court's appointment of counsel, although mentioned by Respondents in their brief to the court of appeals, was not reviewed by the appeals court. Instead, the court of appeals simply noted that the appointment of counsel was "likewise an issue we leave for remand." *Hamdi v. Rumsfeld*,

4th Cir. No. 02-6895, slip. op. at at 14 n.2.

The appeals court's remark is consistent with the fact that the appointment of counsel is not an immediately appealable order. *See Thomas v. Scott*, 47 F.3d 713, 715 (5th Cir. 1995); *United States v. Kane*, 955 F.2d 110, 112 (1st Cir. 1992); *Landano v. Rafferty*, 859 F.2d 301, 302 (3d Cir. 1988); *Weygandt v. Look*, 718 F.2d 952, 954 (9th Cir. 1983). For this reason, Respondents' interlocutory appeal does not divest this court of jurisdiction to consider Respondents' Motion to Terminate Counsel. *See DeFries*, 129 F.3d at 1303; *Green*, 882 F.2d at 1001.

## **II. Next Friends Do Not "Seek Relief" for Purposes of the Appointment of Counsel**

Respondents maintain that the Court could not appoint counsel under 18 U.S.C. § 3006A(a)(2)(B) to Petitioner Hamdi because Petitioner Hamdi is not "seeking relief" under 28 U.S.C. § 2241. Respondents therefore contend that the Court could appoint counsel only for the Next Friend, whom Respondents suggest is ineligible for appointment of counsel. This argument is without merit.

28 U.S.C. § 2242 requires that an application for writ of habeas corpus shall be "signed and verified by the person for whose relief it is intended *or by someone acting in his behalf*." 28 U.S.C. § 2242. Section 2242 therefore authorizes a petition for writ of habeas corpus to be signed by someone acting on behalf of the person "for whose relief [the petition] is intended." Such a person is designated as the "next friend," a person who "resembles an attorney, or a guardian ad litem, by whom a suit is brought or defended in behalf of another." *Morgan v. Potter*, 157 U.S. 195, 198 (1895).

"A 'next friend,' does not himself become a party to the habeas corpus action in which he participates, but simply pursues the cause on behalf of the detained person, who remains the real party in interest." *Whitmore v. Arkansas*, 495 U.S.149, 163 (1990). Courts therefore treat such applications by "look[ing] through the form in which papers are prepared and regard[ing] them in their true character." *Nash v. MacArthur*, 184 F.2d 606, 608 (D.C. Cir. 1950). For example, in a

diversity case, it is the citizenship of the real party in interest, not the next friend, that determines the existence of jurisdiction. *Ziady v. Curley*, 396 F.2d 873, 874 n.1 (4th Cir. 1968); *see also Elliott v. Krear*, 466 F. Supp. 444, 445 (E.D. Va. 1979). In other words, Petitioner Yaser Hamdi, not his father, is seeking relief under § 2241 by virtue of the underlying Petition.

Respondents have misrepresented the holding in *In re Heidnik*, 112 F.3d 105 (3d Cir. 1997). Indeed, the Third Circuit has long recognized that the person represented by a next friend is the only real party before the Court. *Blumenthal v. Craig*, 81 F. 320, 321 (3d Cir. 1897) ("When the minor is so represented, he, and he alone, is recognized as the real party to the controversy, and his rights are concluded by the judgment of the court."). In contrast, the *In re Heidnik* court substituted a putative next friend as a party under Federal Rule of Appellate Procedure 43. 112 F.3d at 107 n.1. The court then remanded the case and directed the district court to appoint counsel for the next friend. *Id.* at 112. *In re Heidnik* does not stand for the proposition that individuals serving as "next friends" are parties to a habeas corpus proceeding.

Petitioner Hamdi's father has not been substituted as a party in this case, and is not "a party to the habeas corpus action in which he participates." *Whitmore*, 495 U.S. at 163. As section 2242 makes clear, Petitioner Hamdi's father has simply filed the underlying Petition on behalf of his son, who is the real party in interest seeking relief from this Court. Accordingly, Yaser Esam Hamdi is the person "seeking relief under section 2241" for purposes of the appointment of counsel under 18 U.S.C. § 3006A(a)(2)(B).

### **III. Yaser Esam Hamdi Remains Financially Eligible For Appointed Counsel**

Respondents contend that Petitioner Yaser Esam Hamdi is not entitled to appointed counsel because press reports indicate that his father is an engineer, and because Petitioner Hamdi has failed to complete Criminal Justice Act Form 23 related to his request for appointed counsel. While Respondents' arguments are frivolous, any serious question regarding Petitioner Hamdi's eligibility for the appointment of counsel can be resolved by bringing Petitioner Hamdi before the Court.

The Criminal Justice Act permits this Court to appoint counsel to represent a criminal defendant or other person eligible for such an appointment as long as the Court is “satisfied after appropriate inquiry that the person is financially unable to obtain counsel.” 18 U.S.C. § 3006A(b). Criminal Justice Act Form 23, appended to Respondents’ Motion, is not required for this inquiry. Indeed, Form 23 “is not a required statutory form. It is an administrative tool used to assist the court in appointing counsel.” *United States v. Moore*, 671 F.2d 139, 141 (5th Cir. 1982).

Furthermore, a person need not be indigent in order to be found “financially unable” to obtain counsel under the Act. *United States v. DeTemple*, 162 F.3d 279, 288 (4th Cir. 1998). “Financial inability to obtain counsel is, of course, a less stringent requirement than is indigency.” *United States v. Foster*, 867 F.2d 838, 839 (5th Cir. 1989).

A person is “financially unable to obtain counsel” within the meaning of subsection (b) of the Act if his net financial resources and income are insufficient to enable him to obtain qualified counsel. In determining whether such insufficiency exists, consideration should be given to . . . the cost of providing the person and his dependents with the necessities of life . . . .

VII Guide to Judiciary Policies and Procedures: Appointment of Counsel in Criminal Cases ¶ 2.04 (“Guide to Judiciary Policies”).

The Guide to Judiciary Policies also points out that “the initial determination of eligibility should be made without regard to the financial ability of the person’s family unless his family indicates willingness and financial ability to retain counsel promptly.” *Id.* ¶ 2.06. Subsequent to the appointment of counsel, “the judicial officer may inquire into the financial situation of the person’s spouse (*or parents, if he is a juvenile*) and if such spouse or parents indicate their willingness to pay all or part of the costs of counsel, the judicial officer may direct deposit or reimbursement.” *Id.* (emphasis added); *see also United States v. Salemme*, 985 F. Supp. 197, 201 (D. Mass. 1997).

Finally, any doubts as to eligibility for appointed counsel should be resolved in favor of appointing counsel. *United States v. Brockman*, 183 F.3d 891, 897 (8th Cir. 1999); *United States v. Harris*, 707 F.2d 653, 660 (2d Cir. 1983); Guide to Judiciary Policies ¶ 2.04. Respondents’

Motion fails to identify any reason for the Court to reconsider its appointment in this case.

As an initial matter, Petitioner Hamdi is not a juvenile, and his father's assets therefore are irrelevant to Petitioner Hamdi's eligibility for appointed counsel. Importantly, Respondents have adduced no evidence to suggest that Petitioner Hamdi is financially able to obtain counsel in this case. Without addressing the financial status of the real party in interest, Respondents' Motion does not challenge the basis for this Court's appointment of counsel.

Even if this Court were to consider Petitioner Hamdi's father's assets, nothing submitted by Respondents suggests that Petitioner's father has sufficient funds to hire counsel in this country, even if he is a "successful engineer." Indeed, the press reports cited by Respondents are not inconsistent with the affidavit filed in this case, which establishes that Petitioner Hamdi is financially unable to hire his own counsel. In fact, the Court of Appeals for the Fourth Circuit previously has appointed the Federal Public Defender to represent Petitioner Hamdi. *See* May 31, 2002, Order (attached as exhibit 1). At the time, neither Respondents nor the Fourth Circuit suggested that Petitioner Hamdi's father's assets had anything to do with the appointment of counsel for Petitioner Hamdi.<sup>1</sup>

Like Respondents, the Federal Public Defender is concerned about the judicious use of the limited time and resources of the Federal Public Defender's Office. Should this Court have some question as to the financial eligibility of Petitioner Hamdi, it is fully capable of bringing Mr. Hamdi before the Court, putting him under oath, and inquiring as to his financial status. *See* May 20, 2002, Tr. at 13 (attached as exhibit 2).

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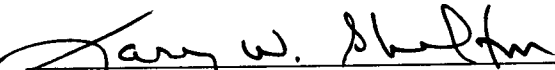
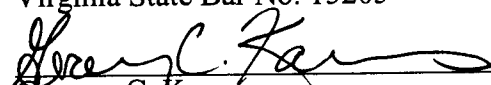
<sup>1</sup> While Petitioner Hamdi's father was not serving as Petitioner Hamdi's "next friend" in that litigation, as explained above that distinction makes no difference.

### III. Conclusion

Wherefore, Petitioner respectfully requests that the Court deny Respondents' Motion to Terminate Counsel.

Respectfully submitted,

FRANK W. DUNHAM  
Federal Public Defender

By:   
Larry W. Shelton  
Supervisory Assistant Federal Public Defender  
Virginia State Bar No. 15205  
  
Jeremy C. Kamens  
Assistant Federal Public Defender  
Virginia State Bar No. 41596

Office of the Federal Public Defender  
150 Boush Street, Suite 403  
Norfolk, Virginia 23510  
(757) 457-0800

**CERTIFICATE OF SERVICE**

I certify that on this 24th day of July, 2002, a copy of the foregoing was sent via facsimile to Lawrence R. Leonard, Managing Assistant United States Attorney, at the Office of the United States Attorney, Eastern District of Virginia, Norfolk Division, World Trade Center, 101 W. Main, Suite 8000, Norfolk, VA 23510.

  
Jeremy C. Kamens  
Assistant Federal Public Defender



## **EXHIBIT 1**

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED  
May 31, 2002

No. 02-6827  
CA-02-348-2  
CA-02-382-2

YASER ESAM HAMDI

Petitioner - Appellee

and

CHRISTIAN A. PEREGRIM;

Plaintiff

FRANK WILLARD DUNHAM, JR., as next friend of Yaser Esam  
Hamdi

Petitioner

v.

DONALD RUMSFELD, Secretary of Defense; W. R. PAULETTE,  
Commander

Respondents - Appellants

and

UNITED STATES NAVY

Defendant

-----  
O R D E R  
-----

The Court appoints the Federal Public Defender at  
Norfolk, VA as counsel to represent appellee in this case.

For the Court - By Direction

/s/ Patricia S. Connor

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CLERK

## **EXHIBIT 2**

COPY

1

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
Norfolk Division

YASER ESAM HAMDI )  
 )  
Petitioner, ) CIVIL ACTION  
 )  
FRANK W. DUNHAM, JR., As Next ) NO. 2:02cv348  
Friend of Yaser Esam Hamdi, )  
 )  
Petitioner )  
v. )  
DONALD RUMSFELD, Secretary of )  
Defense )  
Respondent, )  
COMMANDER W.R. PAULETTE )  
Respondent. )

TRANSCRIPT OF MOTION FOR TIME EXTENSION

Norfolk, Virginia

May 20, 2002

Before: THE HONORABLE TOMMY E. MILLER  
United States Magistrate Judge

Appearances:

OFFICE OF THE FEDERAL PUBLIC DEFENDER  
By: FRANK W. DUNHAM, JR.  
LARRY W. SHELTON  
GEREMY C. KAMENS  
Counsel for the Petitioner

LAWRENCE R. LEONARD  
Assistant United States Attorney  
Counsel for the Respondent

1 consideration is being given to giving the government more  
2 time, that it be coupled with an order that he not be moved and  
3 that we be allowed to see him.

4 MR. LEONARD: Your Honor, I note that Mr. Dunham has  
5 very artfully argued the merits of the petition in response to  
6 a simple request for an extension of time. I will state for  
7 the record that the fact that I did not comment on the specific  
8 allegations of the petition should not be regarded as any kind  
9 of acquiescence in those allegations. I make no representation  
10 one way or the other whether or not Mr. Hamdi is a United  
11 States citizen. That matter is still being investigated.

12 With respect to the right to counsel, surely  
13 Mr. Dunham cannot be claiming that enemy combatants seized on a  
14 field of battle are entitled to attorneys. Now, further  
15 discussion of that issue, again, is tied up in the merits of  
16 the petition.

17 The position of the respondents is simply that  
18 allowing a total of 30 days, or an extension of 21 days, to  
19 thoroughly address those legal issues is not going to in any  
20 way interfere with Mr. Hamdi's further rights to articulate the  
21 merits of the defense or the merits of his habeas action and  
22 will certainly interfere with the government's abilities,  
23 specifically the military's ability, to deal with individual  
24 combatants that they have seized on the battlefield.

25 And finally, there's another issue with respect to

1 Mr. Dunham's request for access, and that has to do with  
2 whether or not the Public Defender was properly appointed as  
3 counsel in this case to begin with.

4           As the court's aware under 3006(a), only persons who  
5 are financially eligible, who shall demonstrate a financial  
6 need are entitled to counsel. My review of the file indicates  
7 that the only evidence proffered in support of that financial  
8 statement were two very short affidavits: one from an attorney  
9 in Qatar and one from Mr. Hamdi's father, neither of which were  
10 in the format of a traditional informa pauperis paperwork  
11 usually submitted in requests for counsel.

12           THE COURT: Well, then we will bring Mr. Hamdi here  
13 tomorrow or this afternoon, and I will put him under oath and  
14 find out if he's indigent. We can do that, you know, if that  
15 bothers you, and he will be subject to penalties of perjury.

16           This is an unusual case because you haven't let  
17 Mr. Dunham or anyone else talk to him.

18           MR. LEONARD: I understand.

19           THE COURT: So the petition was filed on the request  
20 of his father. The only information that was developed was on  
21 the financial ability -- I did not grant the appointment of  
22 Mr. Dunham's office until I had some information as to his  
23 financial eligibility. When I received that information, I  
24 couldn't figure out any other way to determine that financial  
25 eligibility without bringing Mr. Hamdi here. I didn't want to

1 do that until the government had been served and had a right to  
2 respond.

3 Now, if you are concerned about that issue, I'm sure  
4 the Marshals can have him here this afternoon and we can make a  
5 financial inquiry.

6 MR. LEONARD: Well, Your Honor, my view would be that  
7 the elder Mr. Hamdi was obligated to provide the type of  
8 financial information. After all, apparently, Mr. Dunham has  
9 been retained on his behalf through this attorney in Qatar.

10 THE COURT: I don't think Mr. Dunham has been  
11 retained. He's been appointed by this court.

12 MR. LEONARD: All right. But he was asked to be  
13 involved by this attorney in Qatar, and the case law is clear  
14 that on issues of financial eligibility, the financial  
15 resources of the family can be considered. But again, Your  
16 Honor, I would just go back to this whole issue of access to  
17 counsel and everything else is tied up in the merits of this  
18 action, the merits of the habeas petition, and a simple 21-day  
19 request for an extension of time is not going to unduly  
20 prejudice either side in order to get those issues before the  
21 court and then the court's exercise of restraint then determine  
22 whether or not it's appropriate to proceed further.

23 THE COURT: Mr. Leonard, one thing that puzzles me in  
24 your request for the extension of time is that, first off, this  
25 person was brought here at all, brought into the United States